HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 1382 (S/S) year 2001
(Old No. 11248/2000)

Madan Jyoti Verma

Versus

State of U.P. and others

Approved for reporting.

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~~Not approved for reporting~~

Date of decision. 16.10.2003

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL.

Writ Petition No. 1382(S/S) 2001[11248/2000]

Madan Jyoti Verma …..Petitioner

Vs.

State of U.P. and anothers …. Respondents

Sri Ashok Agarwal counsel for the petitioner.
Sri V.K. Bhist standing counsel for the respondent no.1.

Dated:-16-10-2003

Hon'ble Rajesh Tandon, J.

By the present writ petition the petitioner has challenged the order dated 1-10-99 Annexure 15 to the writ petition. He has further prayed for the relief of the issue of a writ order or direction in the nature of certiorari quashing the order of 4-4-2000 by which the representation of the petitioner was rejected.

Factual Background of the Case.

Brief facts giving rise to the writ petition are that the petitioner was appointed by the respondent no. 2 on the post of Dairymen in Dehradun on 6-7-89 on the pay scale of Rs.305-5-390. The petitioner was promoted on the post of Assistant Supervisor on 10-8-1992 by the order dated 16 September 1992 in the pay scale of Rs.950-1500/-.

On 11-12-1995 the respondent number 2 has passed the order of suspension of the petitioner. However, charge sheet was issued on 6th February 1996. On 20 May 1996 the service of the petitioner was terminated.

Against the order of termination the petitioner has approached the labour court in case No.1016 (1) of 1997 under Section 6(3) of the Industrial Disputes Act. On 5th June 1989. The petitioner has lost the case no. 1016 of 1997 and as such the termination order dated 20-5-1996 was challenged in the writ petition. The petitioner has filed the writ petition no.9571of 1998 Madan Jyoti Vs. Presiding Officer Labour Court Dehradun and others. The writ Petition is still pending. The counsel for the petitioner has stated that the writ petition has become infructuous in view of the subsequent writ petition No. 1420/01(9571/1998.

During the pendency of the writ petition number 9571of 1998 Madan Jyoti Verma Vs. Presiding Officer Labour Court Dehradun the case of the petitioner was again considered before the administrative meeting of Dugdh Utpadak Sahkari Sangh Limited. It was discussed as proposal No.10. The extract of the resolution has been annexed as along with the writ petition. The same is quoted below:-

"That the petitioner has also filed a writ petition no. 9571 of 1998 Madan Jyoti Verma Vs. Presiding Officer Labour Court Dehradun and another, in which the award dated 10-12-97 has been challenged. The writ petition is still pending before his Hon'ble Court through the same has become infructuous. That during the pendency of the above noted writ petition the respondent no. 2 discussed the petitioner's case in it administrative meeting dated 5-6-99, through proposal no.10 and passed resolution to constitute a Committee for the enquiry into the matter. An extract of the resolution passed in the

Administrative Committee dated 5-6-99 is being filed herewith and marked as Annexure No.7 to this writ petition."

Committee has made the proper enquiry and passed the order on 5 June 1999 and submitted its report. Paragraph 12 and 13 of the writ petition is quoted below:-

"That inpursuance of the resolution dated 5-6-99 the Committee enquired the matter and submitted its report to the General Manager of the Sangh wherein stated that the action against the petitioner is not bonafide and there was much move out standing amount of sale against some other sales-man but no action was taken and similarly out standing amount lying in the name of the petitioner has already been deposited."

A true copy of the report prepared by the enquiry committee is being filed herewith and marked as Annexure No.8 to this writ petition.

Paragraph 13-" That the Administrative Committee considered the enquiry report of the Chairman of the Committee as item No. 5 and passed order reinstating the petitioner in a service but imposed an unreasonable and arbitrary condition was if the work is found satisfactory within three months, then he will be confirmed.

A true copy of the resolution no.5 passed by the Administrative Committee dated 18-6-99 is being filed herewith and marked as Annexure No.9 to this writ petition.

The resolution No.5 is quoted below:-

" श्री वर्मा के आवेदन पत्र पद प्रषसनिक समिति की बैठक दिनांक 5.6. 99 करे विचार विर्मष हुआ जिसमें यह तय किया गया था कि इनके मामले में 4 सदस्यों की कमेंटी गठित कर जॉच रिपोर्ट्र प्राप्त की जायें, कमेटी के अध्यक्ष श्री सी0डी0 शर्मा एवं सदस्य श्री बीरेन्द्र भण्डारी की रिपोर्ट्र प्राप्त हो गई है तथा अन्य दो सदस्यों के अवकाष पर रहने के कारण कोई रिपोर्ट प्रस्तुत नही की

गई। श्री सी0डी0 शर्मा अध्यक्ष कमेटी की रिपोर्ट्र अनुसार यह कहा गया कि पूर्व प्रधान प्रबन्धक श्री विनोद भूषण द्वारा इनके उचित न्याय न करते हुये द्वेष भावना से इन्हें सेवा से हटाया गया है।''।

The counsel for the petitioner has referred that infact the order dated 26 may 1999 was a reinstatement as will appear from the following line of the order:-

उन्होने श्री वर्मा को तीन माह के प्रोवेषन पर सेवा बहाल पुनः करने हेतु संस्कृति की है, श्री बीरेन्द्र भण्डारी ने भी उन्हे तीन माह के प्रोवेषन पर रखने हेतु सिफारिष की है तथा यह भी कहा है कि यदि इनका आचरण इस अवधि में संतोषजनक पाया जाये तो इन्हें नियमित नियुक्ति दी जाय।

In pursuance of the aforesaid order the petitioner has joined after reinstatement as per order dated 24 June 1999 annexed as Annexure 10 to the writ petition. The condition which was mentioned in the order are quoted below on:-

(1) मान्नीय उच्च न्यायालय में प्रस्तुत याचिका श्री वर्मा द्वारा वापस लेकर उसका शपथ पत्र प्रस्तुत करना होगा।

(2) श्री वर्मा को सेवा से हटाने की तिथि से पुनः सेवा में रखे जाने की तिथि तक के किसी भी एरियर/ बेतन का भुगतान नही किया।

Thereafter the petitioner has joined on 24-6-1999 and resumed his duty. The petitioner was posted at Rishikesh and was discharging his duty.

On 1-10-1999 the petitioner was terminated without any charge sheet and without hearing the petitioner. The petitioner has challenged the termination order dated 1-10-99 by the present writ petition.

The petitioner has filed the present writ petition. At the time of admission following order was passed on 7-3-2000. It has been informed that the representation has also been decided the petitione on 4-4-2000.

A perusal of the order dated 1-10-1999 shows that the services of the petitioner have come to an end. As it will appear from the order dated 1-10-1999 than it was decided that in accordance with the resolution of the committee i.e. resolution no. 5. The work of the petitioner was found unsatisfactory therefore the services of the petitioner were terminated.

Counsel for the petitioner the challenged the order dated 1-10-99 on a number of grounds, interalia; that the resolution no. 5 provides for reinstatement of the petitioner; the reinstatement having been allowed the petitioner was reinstated on 13-6-99; condition imposed by the respondent was without jurisdiction; that the order dated 1-10-99 has been passed without giving any opportunity to the petitioner and therefore the order is bad in law.

Status of the petitioner as probationer

So far as reinstatement is concerned it appears that the petitioner was given the appointment as back as on 6th July 1989 and thereafter he was promoted on 16-September 1992. In the order of reinstatement of the petitioner although a condition has been imposed by respondent no. 2 no writ there was in the original appointment.

As will affect from the facts that the petitioner was appointed on probation but the initial amount of the petitioner was in substantive capacity, therefore the petitioner becomes entitled for the reinstatement on the same.

At the same time the order dated 24 September 1999 shows that the petitioner has contributed to the respondent no.2 to the extent of Rs.3236928-80 paise in August 99 and September 99.

Shri V. K.Bisht counsel for the respondent has also stated that the order impugned although has been passed on the completion of the probation period but nevertheless it lacks proper opportunity tothe petitioner.

The petitioner having been reinstated, there exists a continuity of the service and therefore he was entitled for complete hearing before the impugned order is passed.

The other aspect that even in a law of probations, of in the order stigma has been imposed for all the reason, he was entitled for full hearing as the doctrine of Audi Alteram Partem as had drawn in Basudeo Tiwary V. Sido Kanhu University and others SC 465.

Opportunity of Hearing to a Probationer

Shri V.K. Bisht has submitted that the petitioner was under probation and in any view of the matter since the petitioner has been reinstated therefore he should have been afforded the opportunity.

Petitioner has referred the case Basudeo Tiwari V. Sido Kanhu University and others 1998(6) SC –464. It has been held as:-

"The law is settled that non arbitrariness is an essential facet of Article 14 pervading the entire realm of State action governed by Article 14.It has come to be established, as a further corollary that the audi alteram pertem facet of natural justice is also a requirement of Article 14 for, natural justice is the antithesis of arbitrariness. In the sphere of public employment, it is well settled that any action taken by the employer against the employee must be fair, just an reasonable which are component of fair treatment. The conferment of absolute power to terminate the services of an employee is antithesis to fair, just and reasonable treatment. This aspect was exhaustively considered by the Constitution Bench of this court in Delhi Transport Corporation Vs. DTC, Majdoor Congress reported in JT 1999 SC 725.

In order to impose procedural regards, this Court has read the treatment of natural justice in many equations when the

statute is silent on this point. The approach of this court in this regard omission to impose the hearing requirement in the statute under which the impugned action is being taken does not exclude hearing: "it may be applied from the nature of the power particularly when the right of the party is affected adversely. The justification for reading such a requirement is that the court merely supplies omission of the legislature. (vide Mohinder Singh Gill and Others Vs. The Chief Election Commissioner and others AIR 1978 SC, 851) and except in case of direct legislative negation or applied exclusion (vide S.L. Kapoor Vs. Jagmohan & Other AIR 1981 SC 136).

In the light of these principles of law, we have to examine the scope of provision under section 35(3) which reads as follows:-

"35(3) any appointment or promotion made contrary to the provisions of the Act, statutes rules, or regulation or in any irregular or unauthorized manner shall be terminated at any time without notice."

"The said provision provides that an appointment could be terminated at any time without notice if the same had been made contraryto the provisions of the Act, statutes, rules or regulations or in any irregular or unauthorized manner. The condition precedent for exercise of this power is that an appointment had been made contrary to Act, rules, statutes and regulations or otherwise. In order to arrive at a conclusion that an appointment to the contrary to the provisions, statutes, rules or regulations etc. a findings has to be recorded and unless such a finding is recorded, the termination cannot be made, but to arrive to such a conclusion necessarily an enquiry will have to be made as to whether such appointments was contrary to the provisions of the act etc. if in a given case such exercise is absent, the condition precedent stands unfulfilled. Arrive at such a finding necessarily enquiry will have to be held and in holding such an enquiry the

person whose appointment is under enquiry will have to be issued to him. If notice is not given to him then it is like playing Hamlet without the Prince of Denmark, that is, if the employee concerned whose rights are affected is not given notice of such a proceedings and a conclusion is drawn in his absence such a conclusion would not be just fair or reasonable as notices by this court at DTC Majdoor Sabha's Case. In such an event we have to hold that in the provision there is an implied requirement for hearing for the purpose of arriving at a conclusion that an appointment had been made contrary to the act, statute, rules or regulations etc. and it is only on such a conclusion being drawn the services of the person could be terminated without further notice. That is how section 35(3) in this case will have to be read.

Admittedly in this case notice has not been given to the appellant before holding that his appointment is irregular or unauthorized and ordering termination of his service. Hence the impugned order terminating the services of the appellant cannot be sustained."

The petitioner has also referred the case of State of U.P. Shatrughan Lal SC-3039. The Apex Court has held as under:-

"These findings are assailed before us by the counsel for the State of U.P.

Now, one of the principles of natural justice is that a person against whom an action is proposed to be taken has to be given an opportunity of hearing. This opportunity has to be an effective opportunity and not a mere pretence."

So far as services of the Probation is concerned, no doubt order is a simplicitor termination of service of the petitioner after the period of probation but without any opportunity to the petitioner as required

in view of the Judgment of the Apex Court in 2000(5) SCC Page no.152 as well 2003 (3) S.L.R. page no.150.

The observation in Chandra Prakash Shahi V. State of U.P. and others 2000(5)S.C.C 152 is quoted below:-

"Now, it is well settled that the temporary government servants or probationers are as much entitled to the protection of Article 311(2) of the Constitution as the permanent employees despite the fact that temporary government servants have no right to hold the post and their services are liable to be terminated at any time by giving them a month's notice without assigning any reason either in terms of the contract of service or under the relevant statutory rules regulating the terms and conditions of such service. The courts can, therefore, lift the veil of an innocuously- worded order to look at the real fact of the order and to find out whether it is as innocent or worded. It was explained in this decision that inefficiency, negligence or misconduct may have been the factors for inducing the Government to terminate the services of a temporary employee under the terms of the contract or under the statutory Service Rules regulating the terms and conditions of service which, to put it differently, may have been the motive for terminating the services but the motive by itself does not made the order punitive unless the order was "founded" on those factors or other disqualifications."

The observations in Mathew P. Thomas V. Kerala State Civil Supply corporation limited and others 2003(3) S.L.R is quoted below:-

"So far as the opportunity part is concern, in Bhupinder Pal Singh Vs. Director General of Civil Aviation LLJ 2003 on page no.268 S.C the Apex Court has held that natural Justice requires that the opportunity has to be given. It has been held that the order adversely affects the right and status and amount to violation of

principles of natural Justice if no opportunity is given to the petitioner." The observations are quoted below: -

" Even a perusal of the impugned order indicates that no opportunity was given to the appellant. The High Court proceeded on wrong assumption that the second inquiry was not a de novo inquiry. It appears to us that no opportunity was given to the appellant either during the inquiry made for the first time or in the second inquiry. Since the order passed is in clear violation of principles of natural justice, it is unnecessary for us to go into the merits of the other contentions raised."

It has been observed by the Apex Court in Surendra Kumar Verma Vs. Central Government Industrial Tribunal 1981-AIR (SC)-0-422: 1980-SCC-4-443to the following effect:-

" Semantic luxuries are misplaced in the inpterpretation of 'bread and butter' statutes. Welfare statutes must, of necessarily, receive a broad interpretation . *Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make inroads by making etymological excursions. 'Void ab initio' invalid and inoperative' or call it what you will. The workmen and the employer are primarily concerned with the consequence of striking down the order of termination of the services, the workmen. Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen."*

The aforesaid decision has been following in U.P. Drugs and Pharmaceuticals Co. Ltd. Vs. Ramanuj Yadav and others in 2003 AIR S.L.R. to be following effect:-

"The approach to be borne in mind while interpreting the welfare legislation is illustrated in Surendra Kumar Verma Etc V Central Government Industrial Tribunal –Cum Labour Court, New

Delhi and another (1981) 1SLR 789) Where this Court has observed that semantic luxuries are misplaces in the interpretation of 'bread and butter' statutes. Welfare statutes must, of necessity, receive a broad interpretation. Where legislation is designed to give relief against certain kinds of mischief, the Court is not to make inroads by making etymological excursions."

Conclusions

The order of termination dated 1-10-99 (Annexure 15) passed against the petitioner deserves to be set aside on account of lack of reasonable opportunity to the petitioner as held by the Apex Court in Bhupinder Pal Singh Vs. Director General of Civil Aviation 2003-II LLJ on page no. 208 to the following effect:-

"Even a perusal of the impugned order indicates that no opportunity was given to the appellant. The High Court proceeded on wrong assumption that the second inquiry was not a de novo inquiry. It appears to us that no opportunity was given to the appellant either during the inquiry made for the first time or in the second inquiry. Since the order passed is in clear violation of principles of natural justice, it is unnecessary for us to go into the merits of the other contentions raised."

Shri Ashok Agarwal has stated that he is entitled for the full back wages, Shri V.K. Bisht appearing for the respondent has stated that he is not entitled to get the back wages.

So far as back wages are concerned the Apex Court in Ram Ashrey Singh Vs. Ram Bux Singh 2003-II-LLJ page 206 has held it has held that there cannot be any claim of back wages. The observations of the Apex Court are given below:-

"When fixing the back wages several factors need to be noted. It is a well-settled position in law that on reinstatement there is no automatic entitlement to full back wages. In Hindustan Tin Works Pvt.

Ltd. Vs. Employees of Hindustan Tin Works Pvt. Ltd. And others AIR 1979 SC 75: 1978-II-LLJ- 474, a three Judges Bench of this Court laid down at p.478 of LLJ:-

"In the very nature of things there cannot be a straight –jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be cogent and convincing and must appear on the fact of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fainciful but legal and regular."

In view of the fact and circumstances, the writ petition deserves to be allowed. The order dated 1-10-99 terminating the service of the petitioner is quashed. The petitioner has given undertaking that he will not claim any back wages, therefore the reinstatement of the petitioner will not amount to allowing of the back wages.

However the petitioner will be entitled to claim his salary along along with other benefits for which he may be entitled according to the service regulations.

Consequently, writ petition succeeds and is allowed. There will be no order as to costs.

Dated:-16-10-2003 **(Rajesh Tandon, J.)**

Mohit